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No. 71-1166

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOHN ORMENTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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In 1962 petitioner and other defendants were convicted by a jury in the United States District Court for the Southern District of New York of illegal importion of heroin, in violation of 21 U.S.C. (1964 ed.) 174, and of conspiracy, 18 U.S.C. 371. Petitioner was sentenced to imprisonment for forty years and fined $20,000. The court of appeals affirmed *sub nom United States* v. *Bentvena*, 319 F. 2d 916 (C.A. 2), certiorari denied, *Ormento* v. *United States*, 375 U.S. 940.

On December 20, 1970, petitioner moved to vacate his sentence, propounded interrogatories to the United States Attorney, and moved to disqualify Judge MacMahon, who had presided at his trial. Judge MacMahon refused to disqualify himself, granted the government's motion to strike the interrogatories, and on the basis of the files and records, denied the motion to vacate sentence. While appeal was pending, petitioner, on July 27, 1971, filed in this Court a "Motion for Leave to File Petition for Writ of Mandate to the Honorable Lloyd MacMahon, Judge United States District Court for the Southern District of New York". This motion was denied on October 12, 1971 (No. 71-139). The court of appeals thereafter rejected the appeal. The matters sought to be raised on that motion are now presented in the present petition, which was properly denied by the court below.

1. Judge MacMahon correctly refused to disqualify himself from hearing the motion to vacate sentence. A primary purpose underlying the enactment of 28 U.S.C. 2255 was to enable the trial judge, because of his familiarity with the proceedings and his ability to supplement the record, to pass upon motions for collateral relief. *United States* v. *Hayman*, 342 U.S. 205; *United States* v. *Smith*, 337 F. 2d 49, 53 (C.A. 4), certiorari denied, 381 U.S. 916. The claimed hostility of Judge MacMahon was an issue on direct appeal and was decided against petitioner. *United States* v. *Bentvena*, 319 F. 2d 916, 932-933, certiorari denied, 375 U.S. 940. The court concluded (p. 933):

> We have described sufficiently the outrageous conduct of the defendants at this trial. We find that the trial judge, notwithstanding this harassment, maintained an impartial attitude and did all in his power to safeguard the rights of the defendants and to minimize the effects of these outbursts. * * *

Three of petitioner's co-defendants sought unsuccessfully to have Judge MacMahon recuse himself on collateral attack on their convictions. See *Mirra* v. *United States*, 379 F. 2d 782, 788 (C.A. 2), certiorari denied, 389 U.S. 1022; *Panico and DiPietro* v. *United States* 412 F. 2d 1151 (C.A. 2), certiorari denied, 397 U.S. 921.

2. In addition to his application for collateral review petitioner propounded thirty-nine interrogatories to the United States Attorney. These included whether the government had a basis for believing that petitioner or his trial counsel cooperated with any co-defendant during trial for the purpose of creating a mistrial, whether the government had any basis for believing that any Marshal communicated with the jurors prior to or during the trial and a variety of other questions (Pet. App. A 1-9). The interrogatories were properly stricken since this is not a case in which the district court was confronted with a claim which deserved a hearing or established a *prima facie* case for relief. *Harris* v. *Nelson*, 394 U.S. 286, 290, 300.

3. Petitioner's motion for relief under 28 U.S.C. 2255 alleged that 21 U.S.C. 174, under which petitioner was charged, was unconstitutional on its face

and as applied to him because "it contemplates a criminal intent, by the taking of an overt act, innocent in itself" (Pet. 12), abridges the rights of free speech and is void for vagueness; that count 8 (the conspiracy charge) of the indictment failed adequately to inform him of the accusation against him; that petitioner was prejudiced by being tried together with co-defendant Panico, who was engaged in conduct he was powerless to prevent; that the court was hostile toward defendants in the trial of the case; that illegally obtained evidence whose nature is not described was admitted; that the charge to the jury was improper in that it failed to state that knowledge of illicit importation of narcotics was a necessary element of the conspiracy charge and in that it failed to mention the testimony of a government witness which allegedly contradicted the testimony of principal government witness Smith; that the sentence was cruel and unusual; and that the evidence did not sustain petitioner's conviction (Pet. 4-13).

The constitutionality of 21 U.S.C. 174 is firmly established. *Yee Hem* v. *United States*, 268 U.S. 178; *Turner* v. *United States*, 396 U.S. 398. The additional grounds for holding it invalid suggested by petitioner are insubstantial. The claim that the indictment was defective constitutes no ground for collateral attack. *Cummins* v. *United States*, 368 F. 2d 819 (C.A. 9). The claims of court hostility and of prejudice resulting from being tried together with co-defendant Panico were dealt with on direct appeal (319 F. 2d 929-933). The propriety of the instruc-

tions, not a ground for collateral attack, was also fully considered on the direct appeal (319 F. 2d 938-940), as was the sufficiency of the evidence (319 F. 2d at 923-924, 927-928). The sentence was within statutory limits and, in the circumstances, was appropriate. Petitioner's motion was therefore properly denied on the basis of the files and records in the case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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